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IN THE

Supreme Court of the United States

October Term, 1982

THOMAS W. CULLEN, JR.,
Petitioner,

vs.

BMW OF NORTH AMERICA, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

The petitioner recovered a judgment in the United States District Court for the Eastern District of New York in the sum of $18,000 against the respondent, BMW of North America, Inc. This judgment was reversed by the United States Court of Appeals in a split decision. The petitioner purchased a new BMW motor vehicle from Bavarian Auto Sales an authorized franchisee-dealer of the respondent. The petitioner paid $18,000 for the new car. He never received the new vehicle and he never received a return of his $18,000 payment. This lawsuit was then commenced against the respondent-franchisor and recovery in the lower court was premised upon the theory that the respondent-franchisor was negligent in the financial monitoring of the dealer. The lower court found that the misconduct of the dealer resulting in the petitioner's loss of $18,000 was foreseeable based upon the financial history and the detached indifference of the franchisor to the continuing financial misconduct of the dealer. The United States Court of Appeals in reversing the judgment for the petitioner ruled that the misconduct of the dealer in causing petitioner to suffer an $18,000 loss was not foreseeable. Judge Oakes in a dissenting opinion in harmony with the lower court held that such misconduct of the dealer based upon all the facts was foreseeable. In addition, Judge Oakes stated that foreseeability was a question of fact and, as it was not clearly erroneous under Section 52(a) of the Federal Rules of Civil Procedure, the Court did not have the jurisdiction nor the power to set the verdict aside. Interestingly enough, the United States Court of Appeals in its decision of reversal made no specific mention of any finding that foreseeability was a factual issue that was clearly erroneous, which finding is

indispensable for the United States Court of Appeals to reverse the judgment in favor of the petitioner upon the facts. The following questions are presented:

1. Did a majority of the United States Court of Appeals violate Rule 52(a) of the Federal Rules of Civil Procedure in reversing the lower Court's finding in favor of the petitioner and dismissing the complaint?

2. Did the decision of the United States Court of Appeals violate Rule 17 of the Rules of the Supreme Court of the United States by departing from the accepted and usual course of judicial proceedings?

3. Was the decision of the United States Court of Appeals reversing a judgment for the petitioner in direct conflict with a recent United States Supreme Court decision in *Pullman-Standard v. Swint,* decided April 27, 1982, No. 80-1190, 50 U.S.L.W. 4425-4429?

4. Was the novelty of the lower Court decision an unmentioned influencing factor in the reversal of the lower Court opinion by the United States Court of Appeals?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, Thomas W. Cullen, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on October 13, 1982.

Opinions Below.

The decision and order of the United States Court of Appeals for the Second Circuit dated October 13, 1982,

and reported in 691 F2d 1097, is reproduced as Appendix "A" hereto.

The order of the United States Court of Appeals dated December 6, 1982, which denied petitioner's application for a re-hearing, with Judge Oakes dissenting, is reproduced as Appendix "B" hereto.

The decision and order of the Honorable Edward R. Neaher of the United States District Court dated January 29, 1982, and reported in 531 F Supp 555 is reproduced as Appendix "C" hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 13, 1982. A timely petition for re-hearing and suggestion that re-hearing be held In Banc, was denied on December 6, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statutory and Text Provisions Involved.

1. Rule 52(a) of the Federal Rules of Civil Procedure states:

> "Rule 52. Findings by the Court
>
> "(a) Effect
>
> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions

of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

2. Rule 17 of the Rules of the Supreme Court states:

"RULE 17

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in

conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Statement of the Case.

The facts of the case are as follows:

On January 24, 1979, the petitioner purchased a BMW motor vehicle from Bavarian Auto Sales, a franchised dealer of the respondent. Petitioner paid $18,000, never received the automobile and never received the return of his payment. The dealer went out of business. Petitioner then brought a claim out of which this litigation arose against the franchisor, the respondent herein, to recover the $18,000 payment. The theory of responsibility was that the respondent was negligent in the financial monitoring of its dealership and that the loss sustained by the petitioner was foreseeable based upon the financial history of the dealer, all of which was known to the respondent-franchisor.

Judge Neaher in the lower Court granted judgment in favor of the petitioner upon the theory that the respondent was negligent in the monitoring and supervision of its dealer and that the dealer's misconduct was a foreseeable consequence based upon the financial history.

The United States Court of Appeals, by a 2-1 vote, reversed the judgment for the petitioner and dismissed the complaint holding that the taking of $18,000 of petitioner's money by the dealer was not a foreseeable event. HOWEVER, IN REVERSING, THE UNITED STATES COURT OF APPEALS NEVER STATED THAT IT WAS REVERSING UPON THE GROUND THAT THE FINDING OF FORESEEABILITY WAS "CLEARLY ERRONEOUS." THEREFORE, IT HAD NO JURISDICTION TO REVERSE SUCH A FINDING UNDER RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Judge Oakes in his dissenting opinion stated that the issue of foreseeability was one of fact and that factual issues had been resolved in favor of the petitioner. Judge Oakes further stated that the factual finding of foreseeability was not "clearly erroneous" and, therefore, the United States Court of Appeals had no authority to reverse the judgment in favor of the petitioner.

The following is a portion of the history of the financial difficulties experienced by the dealership and known to the respondent-franchisor, all of which predated January 24, 1979, the date of the Cullen incident:

1. Bavarian (the dealer) in 1978 gave Mr. Matz, a customer, a check for the return of a deposit in the sum of $200 which bounced. This bad check was reported by Matz to BMW/NA on July 24, 1978 (1.44-1.55 Vol. II; E-58 Vol. IV).

2. Bavarian (the dealer) gave Mr. Bloom, a customer, a bad check in the sum of $668 on September 10, 1978 (1.62 Vol. II; E-57 Vol. IV).

3. Bavarian (the dealer) refused to return a deposit to Mr. Schaeffer in the sum of $500 and after two complaints were made to respondent-franchisor, the deposit was finally returned (1.62 Vol. II; E-59 Vol. IV).

4. Mr. Gasser, a customer, gave a deposit to Bavarian of $1,000 for the purchase of a vehicle. The vehicle was not available. Mr. Gasser had to complain to the respondent before the dealer returned his payment (1.62 Vol. II; E-60 Vol. IV).

5. We have four documented complaints involving Matz, Bloom, Schaeffer and Gasser where, in reality, Bavarian attempted to keep monies that didn't belong to it and, in some instances, allegedly paid back the monies with a worthless check.

6. Bavarian and BMW/NA had no franchise agreement in effect in 1979 when the Cullen incident occurred although Bavarian was permitted to operate as a franchised dealer (1.82 Vol. II).

7. It was conceded by counsel for BMW/NA that Bavarian filed only two monthly financial statements from 1975 until the termination of the franchise in 1979. Monthly financial statements were required and, yet, two were filed instead of approximately 48 (1.89 Vol. II; 1.89, 1.90 Vol. II and E-130, E-134 Vol. IV; 1.91 Vol. II).

8. The financial condition of Bavarian was so precarious and the experience of BMW/NA in receiving

worthless checks from Bavarian was so frequent that in 1978 BMW/NA required that Bavarian go on a certified check basis for the payment of parts to be delivered by BMW/NA (1.97 Vol. II).

9. No new vehicles were received by Bavarian from respondent since August of 1978, or six months before the Cullen incident (1.109 Vol. II).

10. Respondent, BMW/NA, became aware that Bavarian passed checks with insufficient funds to other dealerships in 1978 (2.22 Vol. II).

11. Respondent, BMW/NA, permitted Bavarian to participate in promotional advertising in the latter part of 1978 and 1979 when BMW/NA knew that Bavarian was receiving no new cars (2.39 Vol. II).

12. Respondent, BMW/NA, became aware of a judgment recovered by the Israel Discount Bank against Bavarian on October 28, 1977, in the sum of $75,000 (E-63 Vol. IV).

13. The record included a letter from BMW/NA to Bavarian dated December 18, 1978, which recited a long history of financial difficulties of Bavarian, all of which were known to respondent. This letter is annexed hereto as Exhibit "D." Despite this letter, the franchise was continued to February 16, 1979, without an agreement (E-44 Vol. /; 2.46 Vol. II; E-43, 2.53-2.54 Vol. II).

14. In fact, the financial condition of Bavarian was so poor that on August 30, 1978, BMW/NA sent personal representatives to Bavarian to collect payment of obligations (E-25 Vol. IV).

15. Exhibit 27 was an inter-company memo of BMW/NA dated September 1, 1978, marked as Exhibit "E" herewith, which discussed the financial condition of the dealer and indicated that within a sixty-day period the dealership should once again become a viable point in the BMW/NA network. In this connection the memo stated:

> "Should these topics not be reconciled in the specified period, BMW/NA would review the viability and potential longevity of Bavarian Auto Sales in the dealer body" (annexed to this petition is a copy of Exhibit 27).

16. Mr. Trontell of BMW/NA conceded that on August 30, 1978, or about six months before the Cullen incident, he visited Bavarian and in his opinion Bavarian at that time was not a viable franchise (2.61-2.62 Vol. II).

17. On December 15, 1978, or about one month before the Cullen incident, Bavarian passed a bad check to BMW/NA in the sum of $1,200.

18. A memo dated December 19, 1978, established that Mr. Trontell of BMW/NA went to Bavarian to secure the return of nine vehicles, that Bavarian had no floor plan, that Bavarian arranged to borrow two vehicles from Jamaica BMW on December 16, 1978, and that Mr. Trontell of BMW/NA instructed Jamaica BMW not to loan Bavarian any vehicles which were the property of BMW/NA (2.63 Vol. II and E-49-50 Vol. IV, Exhibit 44).

19. During August and September of 1978, Bavarian continued to issue bad checks to BMW/NA which were approximately ten in number and which involved approximately $28,000. This was all within four or five months of

the Cullen incident (Exhibits 29, 30, 31 and 46; E-27, E-30, E-35 and E-52 Vol. IV).

20. MR. TRONTELL OF BMW/NA GAVE AN ESTIMATE THAT BAVARIAN PASSED APPROXIMATELY $40,000 IN BAD CHECKS (2.117 Vol. II).

21. In the letter dated December 18, 1978, Exhibit "D" herein, a communication to Bavarian from BMW/NA, it was recited:

> "As you have been previously informed, your dealership has serious and continuing deficiencies as a result of which you do not meet the minimum standards for a BMW dealership. Accordingly, we are unable * * *"
>
> "* * * to offer you a 1979 dealer agreement" (Exhibit 43).

22. Judge Moore in the majority opinion in the United States Court of Appeals stated:

> "BMW/NA was unaware, however, of any tax levies filed against Bavarian * * *"

23. The Court's finding that BMW/NA was unaware of any tax levies is inaccurate. In fact, BMW/NA ordered a Dun & Bradstreet report on December 19, 1977, on Bavarian and this report disclosed three tax liens of the United States of America against Bavarian in excess of $37,000 (2.160 Vol. II; E-21 Vol. IV). Although this search was disclosed by Dun & Bradstreet at the request of BMW/NA, Mr. Scelsi, the credit manager of BMW/NA,

designated no one to investigate the liens against Bavarian (2.160-161 Vol. II).

24. A prior Dun & Bradstreet report dated October 19, 1977, secured by BMW/NA disclosed that Bavarian had placed all its property as collateral with the Israel Discount Bank (Exhibit 19; 2.161 Vol. II, E-23 Vol. IV).

25. As early as October 28, 1977, Mr. Scelsi of BMW/NA sent an inter-company memo to Mr. Pokorny mentioning that Israel Discount Bank owned all the assets of Bavarian, mentioning that the service manager had resigned and other employees were considering resignation and stating:

> "I really don't like the trend of events taking place at Bavarian and I feel that we should all be watching them very closely" (2.164 Vol. II).

This memo of intensified vigilance was dated October 28, 1977, or approximately 18 months before the Cullen incident.

26. Exhibit 67J in Petitioner's Exhibit Volume I pertained to promotional advertisements by BMW/NA concerning its 3,000 BMW dealerships around the world and this advertising stated in part:

> "As you might imagine, we at Bavarian Motor Works are rather cautious in our choice of dealers."
>
> "So the appointment of a new dealership is a significant event."

REASONS FOR GRANTING REVIEW.

POINT I.

The United States Court of Appeals in reversing the lower Court determination on the issue of foreseeability, violated Rule 52(a) of the Federal Rules of Civil Procedure.

Rule 52(a) of the Federal Rules of Civil Procedure recites that findings of fact made by the trier of the fact shall not be set aside unless clearly erroneous. The majority of the United States Court of Appeals, in reversing the lower Court decision for the petitioner, violated Rule 52(a). The United States Court of Appeals found that the conduct of the franchisee in retaining the $18,000 payment made by Cullen and in failing to give Cullen a new car was not a foreseeable event.

It is submitted that the record before the lower Court demonstrated ample evidence of financial misconduct by the franchisee over a period of many years and that the incident involving Cullen was certainly foreseeable based upon the negligence of the franchisor in monitoring the franchisee and the negligence of the franchisor in permitting the franchisee to continue operations with its incredible background of financial mismanagement.

The doctrine of foreseeability was a question of fact and that question of fact was resolved in favor of the Petitioner in the lower Court. Mr. Justice Oakes in his written dissenting opinion in the United States Court of Appeals stated:

> "Thus I agree with Judge Neaher that the dealer's thievery was foreseeable and that though it

was an intervening act it nevertheless did not absolve BMW/NA of responsibility."

"But, foreseeability is also peculiarly a question of fact. As the New York Court of Appeals said in *Havas,* 49 N.Y.2d at 388, 402 N.E.2d at 1139, 426 N.Y.S.2d at 237, 'it is particularly appropriate to leave this issue' to the finder of fact. *See also* 2 F. Harper & F. James, *The Law of Torts* §18.8, at 1059 (1956) ("Reasonable foreseeability of harm is the very prototype of the question the jury must pass upon in particularizing the standard of conduct in the case before it.") I had supposed that the reason we have Fed. R. Civ. P. 52(a), which tells us that a district court's findings should withstand appellate review unless clearly erroneous, is to give the district court as trier of the fact the same range of determination as we give a jury. Interestingly, only last April the Supreme Court, not very gently, reminded the courts of appeals that Rule 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. In particular, it does not divide findings of fact into ultimate and subsidiary facts." *Pullman-Standard v. Swint,* 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982) (No. 80-1190)."

"Thus because I do not think that the district court's finding of foreseeability was clearly erroneous, I would affirm even if I had some doubt on the foreseeability question. But in light of the applicable New York cases, I do not have even such a doubt."

It is interesting to note that the majority opinion of the United States Court of Appeals erroneously stated in its decision:

> "BMW/NA was unaware, however, of any tax levies filed against Bavarian or the reasons behind the Israel Discount Bank's decision to terminate Bavarian's line of credit."

The Court's finding that BMW/NA was unaware of any tax levies is inaccurate. In fact, BMW/NA ordered a Dun & Bradstreet report on December 19, 1977, on Bavarian and this report disclosed three tax liens to the United States of America against Bavarian in excess of $37,000 (2.160 Vol. II; E-21 Vol. IV). Although this search was disclosed by Dun & Bradstreet at the request of BMW/NA, Mr. Scelsi, the credit manager of BMW/NA, designated no one to investigate the liens against Bavarian (2.160-161 Vol. II).

A prior Dun & Bradstreet report dated October 19, 1977, secured by BMW/NA disclosed that Bavarian had placed all its property as collateral with the Israel Discount Bank (Exhibit 19; 2.161 Vol. II; E-23 Vol. IV).

The majority opinion of the United States Court of Appeals stated, in substance, that the respondent did not control the operation of the dealer. This is not true. The record clearly demonstrated that the respondent controlled the number of vehicles to be allocated to the dealer, the required amount of capitalization, the filing of financial statements, promotional advertising, the requirement that the dealer pay for parts by certified check, acceptable floor plan, makeup of invoices and other documents, the form of and the manner in which the BMW logo was to be used and the term of the franchise agreement.

POINT II.

The decision of the United States Court of Appeals in reversing the lower Court finding of foreseeability was such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The majority decision of the United States Court of Appeals, in effect, reversed the lower court's findings of fact on the issue of foreseeability. This departure from the accepted and usual course of judicial proceedings not only violated Rule 52-a of the Federal Rules of Civil Procedure but also was in violation of Rule 17-1(a) of the Rules of the Supreme Court of the United States. The United States Court of Appeals, by its decision, ignored the decision of the United States Supreme Court in *Pullman-Standard v. Swint,* No. 80-1190, 50 U.S.L.W., 4425-4429.

POINT III.

The decision of the United States Court of Appeals was in direct violation of the ruling of the United States Supreme Court on April 27, 1982 in *Pullman-Standard v. Swint,* No. 80-1190, 50 U.S.L.W., 4425-4429.

In the *Pullman* case the Supreme Court of the United States granted certiorari and stated in its opinion reversing the United States Court of Appeals:

> "We granted the petitions for certiorari filed by the USW and by the Company, —U.S.—, limited to the first question presented in each petition: whether a Court of Appeals is bound by the 'clearly

> erroneous' rule of Fed. Rules Civ. Proc. 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the bona fides of the seniority system. We conclude that the Court of Appeals erred in the course of its review and accordingly reverse its judgment and remand for further proceedings."

Judge White further stated in reversing the United States Court of Appeals because it violated Rule 52(a) of the Federal Rules of Civil Procedure as follows:

> "In reaching this conclusion, the Court of Appeals did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly erroneous standard."

The Supreme Court went on to further state at page 4429:

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts.
>
> The rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in

> saying that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the District Court was not faulted for misunderstanding or applying an erroneous definition of intentional discrimination. It was reversed for arriving at what the Court of Appeals thought was an erroneous finding as to whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard. It is not a question of law and not a mixed question of law and fact."

In the instant case, the United States Court of Appeals made no mention in the majority opinion that it was reversing upon the ground that the finding of foreseeability was clearly erroneous. This was a factual finding supported by the evidence that, on its face, was not "clearly erroneous."

POINT IV.

The novelty of the lower Court decision was an unmentioned influencing factor in the reversal of the lower Court by the United States Court of Appeals.

The issue decided by Judge Neaher in the United States District Court was a case of first impression in the United States. Counsel for petitioner knows of no decision imposing financial responsibility upon a franchisor or automobile manufacturer for the financial default of a franchisee or dealer where the manufacturer or franchisor is negligent in the financial monitoring of the franchisee or

dealer. The United States Court of Appeals in reversing Judge Neaher made no mention that his finding of "foreseeability" was clearly erroneous. An affirmance by the United States Court of Appeals of the decision of Judge Neaher would open up a new area of responsibility in the United States by the automobile manufacturer and/or franchisor to the general public. This Court would have jurisdiction under the commerce clause of the Constitution to set forth a theory of legal responsibility by manufacturers and franchisors to the general public for the financial default of the dealer and/or franchisee when negligent in the supervision thereof.

Conclusion.

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upon the following grounds:

1. The decision of the United States Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure by overruling a finding of foreseeability which was not "clearly erroneous" based upon the evidence sustained in the lower court.

2. That the decision of the United States Court of Appeals violated Rule 17 of the Rules of the Supreme Court of the United States in that the decision of the United States Court of Appeals was a departure from the accepted and usual course of judicial proceedings.

3. That the decision of the United States Court of Appeals was directly contrary to the recent holding of the United States Supreme Court in *Pullman-Standard v. Swint,* decided April 27, 1982, 80-1190, 50 U.S.L.W.,

4425-4429, which held that the Court of Appeals under Rule 52(a) cannot reverse and set aside findings of fact unless "clearly erroneous."

4. The issue before this Court involves an important question of Federal Law. This is a case of first impression in the United States. Under the Commerce Clause of the Constitution, this Court would have jurisdiction.

Respectfully submitted,

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